PEOPLE'S INSURANCE CO. (M) SDN. BHD. v. PEOPLE'S INSURANCE CO. LTD. & ORS.

[O.C.J. (Zakaria Yatim J.) February 28, 1985]

[Kuala Lumpur – Civil Suit No. C72 of 1984]

Company Law – Holding and subsidiary company – Each has separate legal entity – Meeting of Board of directors of subsidiary company – Directors holding senior offices in holding company (parent company) do not represent parent company – They attend meeting as directors of subsidiary – Companies Act, 1965, s. 16(5).

Practice and Procedure – Service out of jurisdiction – Requirement – R.H.C. 1980, O.11 r.1.

In this case, the People's Insurance Company (M), a Malaysian company, was a subsidiary of the People's Insurance Co. Ltd. registered in Singapore. Four senior officers of the holding (parent) company were also directors of the subsidiary. The auditors of the subsidiary company had expressed a view that the sum of $2,001,725 provided for claims for policies issued from October 1, 1975 to September 30, 1976 might not be sufficient to meet claims arising from such policies. The matter was placed before the Board meeting of the subsidiary where at the instance of those four directors it was resolved that the parent company would guarantee any shortfall in excess of $2,001,725. There was a shortfall of $2,817,395 and the subsidiary company sought to recover the amount from the parent company. The parent company, the first defendant in the present case, denied any liability. The subsidiary company then filed a suit against the parent company and the four directors. The plaintiffs obtained an order from the Senior Assistant Registrar allowing them to issue a notice of writ and to serve it on all defendants in Singapore under Order 11 rule 1 of the Rules of the High Court, 1980.

The present application was made by the defendants to set aside the order of the Senior Assistant Registrar.

Held: (1) the parent (holding) and subsidiary Companies are two separate legal entities;

(2) officers of the parent Company who are on the Board of the subsidiary are not representatives of the parent Company but sit at the Board meeting as directors and agent of the subsidiary;

(3) a resolution of the Board of Directors of the subsidiary does not bind the parent company. The resolution did not constitute a contract between the parties;

(4) in order to obtain leave from the Court to serve their writ out of jurisdiction under Order 11 rule 1 it is necessary for the plaintiffs to show that they have a cause of action. In this case the plaintiffs have failed to satisfy this requirement;

(5) the application was allowed and the order of the Senior Assistant Registrar was set aside.

Cases referred to:

(1) *Ebbw Vale Urban District Council* v. *South Wales Traffic Area Licensing Authority* [1951] 2 K.B. 366.

(2) *Northern Counties Securities Ltd.* v. *Jackson & Steeple Ltd.* [1974] 1 W.L.R. 1133.

(3) *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance Co.* [1983] 2 W.L.R 250.

CIVIL SUIT.

S.S. Muker for the plaintiffs/respondent.

D.P. Naban for the defendants/applicants.

Cur. Adv. Vult.

Zakaria Yatim J. : This is an application by the defendants for an order of the Court that an order made on January 11, 1984 granting leave to the plaintiffs to issue a writ and leave to serve the notice of the writ on the defendants in Singapore be set aside.

The plaintiff company carries on business in Malaysia and its registered office is at No. 84, Jalan Ampang, Fourth Floor, Denmark House, Kuala Lumpur. The first defendant is a company which carries on business in Singapore and its registered office is at No. 6 Cecil Street, Singapore. The second, third, fourth and fifth defendants are residents in Singapore. In 1978 the plaintiff company was a subsidiary of the first defendant company. The plaintiffs averred that the first defendant company was represented at the board of directors of the plaintiff company by the second, third, fourth and fifth defendants, who were senior officers in the first defendant company.

The third defendant was the Managing Director, the fourth defendant was the General Manager and Director and the fifth defendant was the Executive Director. On January 12, 1978 the third meeting of the board of directors of the plaintiff company was held at the Company's Board Room at 54, Jalan Pudu, Kuala Lumpur (hereinafter "the said meeting"). The second, third, fourth and fifth defendants were present at the said meeting. During this meeting, the auditor expressed the view that the sum of $2,001,725.09 provided in the accounts for claims in respect of policies issued from October 1, 1975 to September 30, 1976 might not be sufficient to meet claims arising from such policies. The second, third, fourth and fifth defendants undertook to be responsible for any shortfall. The plaintiff company averred that the first defendant company was liable to pay the plaintiff company a sum of M$2,817,395.07 being the shortfall by the plaintiff company. The first defendant company denied any liability.

On November 11, 1984, the plaintiff company filed a writ against the defendants in the High Court, Kuala Lumpur. On the same date, the plaintiffs obtained an order from the Senior Assistant Registrar allowing them to issue a notice of the writ and to serve it on all the defendants in Singapore. The present application is to set aside the order of the Senior Assistant Registrar.

The order granted by the Registrar was made pursuant to Order 11 Rule 1 of the Rules of the High Court, 1980. In their affidavit in support of their application for the order dated November 11, 1984, the plaintiffs averred that they had a good cause of action against the defendants in that their claim arose out of a breach of contract made within jurisdiction. According to the plaintiffs the contract was concluded during the said meeting of the board of directors of the plaintiff company, where the second, third, fourth and fifth defendants were present as representatives of the first defendant Company. Page 8 of the minutes of the said meeting contains the following:

"The matter was discussed at length by the Board, Mr. Chow Cheng Hoi informed the Board that before the adjustments on unexpired risks reserve between the parent company and the Company were decided upon several discussions took place between the Directors and the Auditors. Messrs. Coopers & Lybrand was consulted on the tax implication on the basis of the adjustments and clarification was also sought from Inland Revenue Department. It appears that the Company should only take over 3 months of the reserve for the unexpired risks in respect of the policies issued by the former branches of the parent company in Malaysia. On the proposal of Mr. Ong Chay Tong seconded by Mr. Nathan, it was resolved that the parent Company undertake to guarantee any shortfall in excess of $2,001,725.09 as provided in the accounts of the Company so that all liabilities arising from policies issued before December 31, 1976 will be fully met by its parent company."

It was conceded by Counsel for the plaintiffs that the basis of their claim was the above resolution. In their affidavit dated August 16, 1981 (enclosure 18), the plaintiffs averred that the "second, third, fourth and fifth defendants were the representatives of the first defendant company and . . . served on the Board of Directors of the plaintiff Company as agents of the first defendant." The third defendant, however, in his affidavit dated March 8, 1984 (enclosure 6), stated that the "2nd, 4th, 5th defendants and I attended the said meeting as Directors of the Plaintiff Company and not as representatives of the 1st defendant Company."

It was not disputed that the second, third, fourth and fifth defendants were members of the board of directors of the plaintiff company. According to page 1 of the document exhibited by the plaintiff in enclosure 18, the second defendant was the Chairman of the plaintiffs' board of directors. The third and fifth defendants were members of the said board of directors. The fourth defendant was the general manager of the plaintiff company. At the said meeting of the plaintiff company the second, third, fourth and fifth defendants sat as members of the board. This is clearly shown at page one of the minutes of that meeting. The relevant part of the minutes is quoted below:

"THE PEOPLE'S INSURANCE CO (MALAYSIA) SDN. BHD.

(Incorporated in Malaysia)

Minutes of the Third Directors' Meeting of the Company held at the Board Room, 2nd Floor, 54 Jalan Pudu, Kuala Lumpur on Thursday, January 12, 1978 at 6.00 p.m.

PRESENT:	Datuk Wan Salaidin Alhaji bin Wan Ismail. *Mr. Ng Eng Kiat* *Mr. Ong Chay Tong* *Mr. Chew Cheng Hoi* Mr. V.P. Nathan Mr. Ng Hee Teck Mr. Ooi Beng Whye *Madam Teo Guan Eng*
IN ATTENDANCE:	Mr. Lee Chee Chow (Secretary)
BY INVITATION:	Mr. Henry Loo Mr. Lai Yeow Kwang representing the Auditors, Messrs. Lai Yeow Kwan & Co."

[Emphasis added.]

It is clear that the second, third, fourth and fifth defendants attended the said meeting of the plaintiff company in their capacity as members of that Board. They were not present at the meeting by invitation or as representatives of the first defendant company or any other companies, but when they sat at the said meeting of the plaintiff company, they were there only as members of the board of directors of the plaintiff company.

The plaintiff company is a legal entity by itself. Although it is a subsidiary of the first defendant company, the plaintiff company maintains its own separate entity. In *Ebbw Vale Urban District Council* v. *South Wales Traffic Area Licensing Authority*,[1] Cohen L.J. said:

"Under the ordinary rules of law, a parent company and

subsidiary company, even a 100 percent subsidiary company, are distinct legal entitles ..."

Since the plaintiff Company is a separate legal entity, its board of directors is one of its organs and all members of the board are the agents of the plaintiff company. In *Northern Counties Securities Ltd.* v. *Jackson & Steeple Ltd.*[2] Walton J. clearly said:

". . . a director is an agent, who casts his vote to decide in what manner his principal shall act through the collective agency of the board of directors."

In the instant case, when the members of the board met and passed resolution, they were therefore, acting on behalf of their principal, *viz*, the plaintiff company. Thus, the second, third, fourth and fifth defendants were acting solely as agents of the plaintiff company when they set at the said board meeting and passed the resolution in question. The said resolution cannot constitute a contract as a contract can be only concluded between at least two parties. Section 10(1) of the Contracts Act, 1950 clearly states:

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

In the present case the plaintiffs have failed to satisfy any of the requirements under section 19(1).

In order to obtain leave from the Court to serve their writ out of jurisdiction under Order 11 rule 1, it is necessary for the plaintiffs to show that they have a cause of action. See *Mallal's* Supreme Court Practice, 2nd edn. vol. 1 p.56. In the instant case they have failed to satisfy this requirement. In any event, even if there is cause of action, I do not think this is a proper case for service out of jurisdiction to be granted under O.11 on the facts of this case. See *Amin Rasheed Shipping Corporation* v. *Kuwait Insurance Co.*[3]

In the circumstances, I allow the application and set aside the order of the Senior Assistance Registrar dated January 11, 1984. The costs of, and incidental to this application shall be paid by the plaintiffs to the defendants.

Application allowed.

Solicitors : *Lovelace & Hastings; Skrine & Co.*

UNITED MANUFACTURERS SDN. BHD. v. POGON TOKOU SDN. BHD. & ANOR.

[O.C.J. (Abu Mansor J.) March 7, 1985]

[Kota Kinabalu – Civil Suit No. K134 of 1983]

Practice and procedure – Hire purchase agreement – Claim for stated sum – Striking out defence – Triable issues raised – R.H.C. 1980, O.18 r.19.

In this case the plaintiffs applied by summons for an order that the defendant's statement of defence be struck out under O.18 r.19 or alternatively under the inherent jurisdiction of the Court on the usual grounds. The claim is for a specified sum of money relating to a hire purchase agreement entered into on April 1, 1980.

Held: (1) the plaintiffs have failed to prove their allegations and the claim is not clearly unarguable;

(2) the defendants have successfully raised two triable issues, one relating to the actual date of termination of the hire purchase agreement and the other the actual loss suffered by the plaintiffs;

(3) in order to come to a just and proper decision, this matter must go to a full trial. The plaintiffs' application was therefore dismissed with costs.

[*Editorial Note:* The plaintiffs filed an appeal to the Supreme Court on March 27, 1985.]

Cases referred to:

(1) *Wearne Brothers (M) Ltd.* v. *Jackson* [1966] 2 M.L.J. 155, 156.
(2) *United Engineers (Malaysia) Ltd.* v. *Lai Ping Yoon* [1968] 1 M.L.J. 189.
(3) *Khoo Thau Sui* v. *United Engineers (M) Sdn. Bhd.* [1977] 2 M.L.J. 204.
(4) *Voo Min En* v. *Liong Chung Fatt* [1982] 2 M.L.J. 241.
(5) *Cow* v. *Casey* [1949] 1 K.B. 474.
(6) *United Malayan Banking Corporation* v. *Palm & Vegetable Oils (M) Sdn. Bhd. & 2 Ors.* [1983] 1 M.L.J. 206 F.C.
(7) *Syarikat Bunga Raya Timor Jauh Sdn. Bhd.* v. *Tractors Malaysia Bhd.* [1983] 1 M.L.J. 121 F.C.

SUMMONS-IN-CHAMBERS.

D. Puthucheary (*Edward K.C. Tsen* with him) for the plaintiffs.

Richard Malanjum (*Phillip Lee* with him) for the defendants.

Cur. Adv. Vult.

Abu Mansor J. : I dismissed with costs the plaintiff/appellant's Summons-in-Chambers application dated October 18, 1984, for an order that the defendant's Statement of Defence be struck out under O.18 r. 19 or alternatively under the